UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 776, Affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO (LOCKHEED MARTIN AERONAUTICS CO.)

and

Case No. 16-CB-120321

ROSALIND R. MILLER, An Individual

Becky Mata, Esq., Counsel for the General Counsel. Rod Tanner, Esq., Tanner & Associates, P.C., Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on July 7, 2014¹. The Complaint herein, which issued on April 30, and was based upon an unfair labor practice charge that was filed on January 9, by Rosalind Miller, an individual, alleges that Aeronautical Industrial District Lodge 776, affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union and/or the Respondent, the collective bargaining representative of certain employees of Lockheed Martin Aeronautics Co., herein called the Employer, including Miller, refused to process a grievance concerning overtime for Miller because she was not a member of the Union.

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that it has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

Miller has been employed by the Employer as a janitor since November 2002 when she joined the Union and completed a dues deduction form. She subsequently resigned from the Union, although she continued to pay a monthly agency fee to the Union. In 2011 she transmitted a doctor's note to the Employer stating that due to a medical condition she should not work more than forty hours a week, and that restriction has been complied with since that time. (The Union witnesses referred to this restriction as a "medical code.") The present conflict arose during Christmas Week of 2013, when the employees receive a week's holiday pay, without working. Miller testified that on Friday December 20, prior to the Christmas week, she asked Tim Acree, her supervisor, if she could work three days during the Christmas holiday week as overtime, and later that day, he told her that she could work three days overtime that week and that she should report to work on Monday morning. After working for six hours on

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2014.

Monday, December 23, 2013 she was told by a supervisor that she wasn't on the overtime list and that she should go home, and she left the facility. Emilio Lopez, Jr., Miller's supervisor, testified that during the Thanksgiving holiday in 2013 he gave Miller and other janitorial employees three hours of overtime. I asked Lopez if an employee, such as Miller, has a code restricting his/her work to forty hours a week, can that employee work "overtime" during holiday weeks when they didn't actually work a full week, such as Thanksgiving, when Thursday was a paid holiday, or Christmas, when the entire week was a paid holiday, and he answered that he did not know. Paul Black, President of the Union, testified that the Employer chooses overtime "from low to high on the overtime list," for each day that overtime is available and employees have to apply for overtime by the close of business Thursday prior to the week overtime is requested for. As Miller applied on Friday, December 20, she was not eligible for overtime the week of December 23. A Mutual Agreement, Holiday Work Scheduling executed by the Union and the Employer in 2006 and 2009 states, inter alia:"... holiday work will be scheduled from this current list beginning with the low employee on the list and moving up to the high employee...In the event a holiday period begins on a Monday or Tuesday, all holiday work for that period will be scheduled not later than close of business on the preceding Thursday."

Article 7, Section 5 of the contract between the Union and the Employer, effective July 2, 2012. states:

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A Steward's Union activities on Company time shall fall within the scope of the following functions:

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(a) To consult with an employee regarding the presentation of a request, complaint or grievance which the employee desires him/her to present.

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in an attempt to settle the matter for the employee or group of employees who may be similarly affected.

(c) To present a grievance to an employee's department head in accordance with Step

(b) To present a request, complaint or grievance to an employee's immediate supervisor

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(d) To investigate a complaint or grievance of record after presentation to the appropriate supervisor.

Two of the Grievance Procedure.

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(e) To meet by appointment with an appropriate supervisor or other designated representative of the Company, when necessary, to adjust grievances in accordance with the Grievance Procedure of this Agreement...

Because her steward, L.A. Moore (who did not testify) was not at work on January 7², Miller called David Webb, the Union's Business Representative, and told him that she wanted to file a grievance about being sent home before completing her overtime work on December 23, 2013 and he told her that she would have to talk to her steward, Moore about it. She testified that as she is required to first ask her supervisor to arrange a meeting with the steward she

² It is not clear from Miller's testimony on direct examination whether she made this call on January 7, as she initially testified, or on January 2 as he testified during cross examination. Later, during cross examination, she appeared to clear up this conflict by testifying that she initially called Webb on January 2, and called him again on January 7 to say that Moore said that he wouldn't talk to her because she was not a Union member.

asked Lopez to set up a meeting with Moore, because she wanted to file a grievance. Lopez testified that he called Moore at the plant and asked him if he could come to talk to Miller because she was sent home during the holidays and wanted to know why, and Moore said that he wouldn't talk to her because she was not a Union member. Shortly thereafter, Lopez spoke to Miller and told her what Moore said and she asked Lopez if he would put it in writing and he did, writing that on January 7 Moore told him that Miller was "...not a Union member and he not [sic] going to talk to her." After hearing this, she again called Webb and told him that she wanted to file a grievance, but that she was told that Moore wouldn't talk to her; he said that he would talk to Moore, but she never heard from Webb, or anybody else from the Union about her request to file a grievance. She has a recording system on her home telephone and received no messages from Webb, or anybody else from the Union regarding her request to file a grievance.

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Webb testified that he received a telephone call from Miller on January 2 saying that she needed to talk to a business representative because she came in for holiday overtime and was sent home before she had completed the overtime. He asked her who her steward was and she said that it was Moore, but that he was not in that day. He told her that he would contact Moore and get back to her and she gave him her telephone number. He told her that they had eight working days in which to file a grievance, so there shouldn't be a problem. When Webb spoke to him, Moore told him that since December 2011, Miller has had a code that limited her to forty hours a week. He testified that employees who have a forty hour code, such as Miller, don't work overtime:

And on holiday overtime, it's not like regular overtime. You ask for each individual day, then you re-average, then you just sit there and ask for another day, you re-average...and she wasn't even eligible to be asked because she had...zero hours.

Webb was asked if she was eligible for holiday overtime, and he testified that she wasn't because of her code. In fact, because of her code, she should not have been on any overtime list. When he learned all of this prior to Moore telling him that she was not a Union member, he determined that she did not have a valid grievance. He attempted to call Miller at home, but was unable to get in touch with her and tried to call her at work as well, but was unsuccessful in that attempt, as well. Although the Union has Miller's address, he did not send her a letter telling her that the Union was not going to process her grievance because that is not the Union's "procedure;" the Union never sends letters to employees telling them that they are not going to process a grievance. Black testified that he discussed Miller's grievance and Moore's comment with Webb, who told him what Moore said and that he reprimanded Moore for making the comment. Black went with Webb to the facility, where they met with Moore and he "reinforced" Webb's reprimand. In addition, Webb told him the facts of Miller's grievance and he told Webb that he was "...making the right call and we don't need to file it." A few days later, when the Union was notified that Miller had filed an unfair labor practice with the Board, Webb again approached him and said that they still had time to file a grievance for Miller, but Black said: "I'm not going to file. If it's not a grievance, it's not a grievance... I don't care if there's a Board charge or not, it's not the right thing to do. We don't have a grievance, so we're not going to file it." He and Webb decided not to process the grievance; Moore had no part of the decision.

Lopez testified that the procedure that is employed in filing a grievance is that the employee first talks to him about his/her grievance, "and then it goes through the Union hall, and then it comes back." Webb and Black testified that the employee will initially speak with the steward and tell him of his dispute and why he believes it is a contract violation. The steward then calls the business representative, tells him the facts, and the business representative investigates the matter to determine whether or not it is a proper grievance. Stewards have no authority, on their own, to issue grievances; only the business representatives have this

authority. If the business representative determines that the employee complaint constitutes a proper grievance, he will prepare the grievance and issue it to the steward, who handles it from that point up to Step 3. If it cannot be settled by that point, it returns to the Union office for Steps 3 and 4, arbitration. The Union's By-Laws state that the business representatives "investigate and adjust grievances in accordance with the CBA." Business representatives can overrule grievance recommendations of stewards, but the reverse in not true.

In order to refute the allegation that the Respondent did not process Miller's grievance because she was not a Union member, Webb and Black testified that the Union does not discriminate against non-members and has processed grievances for non-members. Webb testified that the Union arbitrated a grievance filed by Business Representative T. David Faith for non-member Ralph Cahill and received an arbitration award in the amount of \$135,000. Black was shown a Grievance List for Moore's department for the period July 2012 to July 2014 and he identified two grievances filed by a non-member, Timothy Strothers, in September 2012 and October 2012 that the Union processed and believed that there were others, but he could not testify with certainty about who they were. Black testified that while Cahill was a non-member paying agency fees, like Miller, from 1993 to 1995, and that the Union prevailed in an arbitration for him with an award of \$135,000, he is not certain that Cahill was a non-member at the time of the arbitration.

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III. Analysis

The sole allegation herein is that the Respondent failed to process Miller's grievance because she was not a Union member, in violation of Section 8(b)(1)(A) of the Act. The only direct evidence supporting this allegation is the undisputed evidence that Moore told Lopez that he would not discuss the grievance with Miller because she was not a Union member. Respondent defends that even if this statement is a violation of the Act, the Union, by Black and Webb, remedied the violation by reprimanding Moore for what he told Lopez, and that Moore acted outside the scope of his authority when he made the statement. Respondent defends further that it doesn't discriminate against non-members and has processed grievances for non-members.

It is undisputed that a union must fairly represent all of the employees in the unit, whether or not they are members of the union, and as the statutory bargaining representative of those employees, it must administer the grievance-arbitration provision of the collective bargaining agreement fairly, and in good faith. A union violates that duty when its conduct toward a unit member is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171 (1967). However, unions have discretion in determining whether grievances merit being processed, and mere negligence on the part of a union is insufficient to establish a violation of its obligation to represent all employees fairly. King Soopers, 222 NLRB 1011 (1976). In addition, when a union refuses to process a grievance for a unit employee because that employee is not a member of the union, a violation of Section 8(b)(1)(A) of the Act has been established. General Teamsters Local Union No. 528 (Associated Grocers Coop), 265 NLRB 415 (1982). The issue in the instant matter is whether the Union refused to process Miller's grievance because it determined in good faith that it lacked merit, or whether the fact that she was not a Union member was the cause, or a cause, of the Union's failure to process the grievance. International Brotherhood of Electrical Workers, Local 2127 (I-T-E Electrical Products), 271 NLRB 885 (1984).

There are a number of uncertainties in this matter: although it is clear that Miller had a "code" and was not permitted to work overtime, there was some disagreement as to whether she was eligible to work overtime on holidays, such as Christmas and Thanksgiving, when she

was paid, but did not work. I find that it is reasonable to conclude that the restriction which was meant to limit her work hours, did not apply when she did not work, so the code would not prevent her from working overtime on holidays. Miller and Lopez testified that she worked overtime on the Thanksgiving holiday, while the Employer's records do not confirm this, and I credit Miller and Lopez' testimony. More difficult is the credibility issue as to whether Webb attempted to contact Miller to tell her that the Union determined that her grievance lacked merit. He testified that he attempted to call her at work and at home, but was unsuccessful in both attempts. Miller testified that she has a recording system on her home telephone and did not receive any messages from Webb, or anyone from the Union about her grievance. In addition to the fact that I found Miller to be totally credible and believable, it is not unreasonable to expect a union that was unable to call a unit member to tell him/her that they were not going to process a grievance, to send a letter to the employee to that effect; after all, they had her address. I therefore find that Webb did not call Miller to tell her that they were not going to process her grievance.

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Although I have found that Miller was eligible to work overtime on holidays and, in fact, had worked on Thanksgiving 2013, and that Webb failed to notify her of the Union's decision not to process her grievance. I find that the Union's decision not to process her grievance was within the discretion and the "wide range of reasonableness" afforded them under Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). The principal reason for this finding is that the Mutual Agreement, Holiday Working Schedule agreed to by the Union and the Employer in 2006 and 2009 states that when a holiday period begins on a Monday or Tuesday, all holiday work for that period will be scheduled no later than the close of business on the preceding Thursday. As Miller testified that she applied to work Christmas week on the Friday before the holiday, she was late in applying and that may have been the reason that she was told to leave after six hours at the facility on December 23, 2013. In addition, although Black testified that he is uncertain whether Cahill was a Union member when the Union won an arbitration on his behalf, there was no issue as to Strother's non-Union status when the Union processed his grievances. Therefore, although Moore told Lopez that he wouldn't talk to Miller because she was not a Union member, I find that the Union's refusal to process Miller's grievance was not arbitrary or unreasonable and did not violate the Act. International Brotherhood of Electrical Workers, supra. at 889.

A threat by a Union representative that he will not process a grievance because the grievant is a non-member violates Section 8(b)(1)(A) of the Act. *Plumbers Local 195 (Bethlehem Steel)*, 291 NLRB 571 (1988); *American Postal Workers Union (Postal Service)*, 310 NLRB 599, 602 (1993). As there is no factual dispute as to Moore's threat and its promulgation to employees, and because it was fully litigated, and is intimately related to the subject matter of the Complaint, I find this statement unlawful even though it is not specifically alleged in the Complaint. *Crown Zellerbach Corporation*, 225 NLRB 911, 912 (1976); *General Teamsters, Local Union No. 528, supra*, at 418.

Counsel for the Respondent defends that even if Moore's statement violates the Act, Moore "acted outside his scope of responsibilities with respect to his comments regarding Miller" and, additionally, that no remedy is needed in this matter because Black and Webb already reprimanded Moore for his comment. Both of these defenses are rejected. As to the former, the evidence is clear from the contract and the testimony that the employees deal exclusively with the stewards in Steps 1 and 2 once the business representatives approve of the grievance. As Counsel for the General Counsel argues in his brief, I find that Moore had actual and apparent authority when he made the statement to Lopez. *International Brotherhood of Electrical Workers, Local 98 (MCF Services)*, 342 NLRB 740, 742 (2004). As to counsel for the Respondent's latter defense, the mere fact that Black and Webb "reprimanded" Moore falls far

short of the Board's requirements for remedying an unfair labor practice. The Board requires that any alleged repudiation must be timely, unambiguous, specific in nature to the coercive conduct and "...there must be adequate publication of the repudiation to the employees involved..." Passavant Memorial Area Hospital, 237 NLRB 138 (1978); International Longshoremens' Association Local 1423 (Savannah Maritime Association), 306 NLRB 942, 947 (1992). As nobody other than Moore was informed that his statement was inappropriate, I find that it has not been properly repudiated.

Conclusions of Law

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- 1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
 - 2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

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- 3. The Respondent violated Section 8(b)(1)(A) of the Act by the statement of L.A. Moore, its steward, that he would not speak to Rosalind Miller about her grievance because she was not a member of the Union.
- 4. The Respondent did not violate the Act as further alleged in the Complaint.

The Remedy

Having found that the Respondent has violated the Act, I recommend that it be ordered to cease and desist from engaging in this conduct and that it post a notice to this effect at its office and on the bulletin boards provided to the Union by the Employer at its facility, pursuant to the collective bargaining agreement between the parties.

Upon the foregoing findings of fact, conclusions of law and on the entire record, I hereby issue the following recommended³

ORDER

The Respondent, Aeronautical Industrial District Lodge 776, Affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors and assigns, shall:

- 1. Cease and desist from threatening employees of employers whose employees it represents, that it will not process their grievances because they are not members of the Union, or in any like and related manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following action designed to effectuate the policies of the Act:

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³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (a) Notify Rosalind Miller in writing that it will not refuse to consider or process her grievances due to her non-membership in the Union.
- (b) Within 14 days after service by the Region, post at its Union office and on the bulletin boards at the Employer's facility in Ft. Worth, Texas, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 7, 2014.

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- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- 20 **IT IS FURTHER ORDERED** that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 18, 2014

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Joel P. Biblowitz Administrative Law Judge

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4 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted
 50 Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT tell employees of Lockheed Martin Aeronautics Co., or any other employer whose employees we represent, that we will not process their grievances because they are not members of the Union.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify Rosalind Miller, in writing, that we will not refuse to process her grievances because she is not a member of the Union.

AERONAUTICAL INDUSTRIAL DISTRICT 776, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Dated	Ву	
	(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24 Fort Worth, Texas 76102-6178 Hours: 8:15 a.m. to 4:45 p.m. 817-978-2921.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CB-120321 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 817-978-2925.